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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

JENNIFER MAREK and ISABELLE DWIGHT
as individuals, on behalf of themselves, the gen-
eral public and those similarly situated,

Plaintiffs,

v.

MOLSON COORS BEVERAGE COMPANY
USA LLC and MOLSON COORS BEVERAGE
COMPANY,

Defendants.

CASE NO. 21-cv-07174-WHO

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR APPROVAL OF
CLASS ACTION SETTLEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

MOTION HEARING

DATE: February 22, 2023

TIME: 2:00pm

ZOOM CONFERENCE

Judge William H. Orrick

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on February 22, 2023 at 2:00pm, or as soon as the matter may be heard, via Zoom videoconference, before the Honorable William Orrick, Plaintiffs Jennifer Marek and Isabelle Dwight (“Plaintiffs”)¹ shall and hereby do move the Court for an order:

- (1) granting preliminary approval to the Settlement;
- (2) approving, for settlement purposes only, the certification of a Settlement Class defined as all persons, other than Excluded Persons,² who, during the Class Period of January 1, 2020 through the date of preliminary approval, purchased, in the United States, any Vizzy brand hard seltzer beverages, except for purpose of resale;
- (3) approving and ordering the implementation of the Notice Plan set forth in the Settlement Agreement; and
- (4) setting a date for a Final Approval Hearing.

A copy of the [Proposed] Order Granting Preliminary Approval of Class Action Settlement is attached to the Settlement Agreement as Exhibit C and also separately submitted herewith.

PLEASE ALSO TAKE NOTICE that, after expiration of the time for Class Members to opt out or object, and upon the occurrence of the final approval hearing, Plaintiffs will seek entry of a further order:

- (1) granting final approval to the Settlement and entering judgment thereon;
- (2) requiring Defendant Molson Coors Beverage Company USA LLC (“Defendant”) to

¹ The capitalized terms used herein are defined in and have the same meaning as used in the Settlement Agreement unless otherwise stated. Jennifer Gannon, Darren Williams, Evvie Eyzaguirre, Brandi Fike, Lance Waldron, Jessica Tempest, and Vivian Nogueras are named as Plaintiffs in the proposed Second Amended Complaint (Dkt. 56). They join in this motion and are included in the definition of “Plaintiffs” as used herein.

² Excluded from the Class are (1) the Honorable Judge William Orrick, the Honorable Iain D. Johnston, the Honorable Lisa Jensen, the Honorable William P. Dimitrouleas, the Honorable Jay Gandhi (Ret.), and any member of their immediate families; (2) any government entity; (3) Defendant; (4) any entity in which Defendant has a controlling interest; (5) any of Defendant’s subsidiaries, parents, affiliates, and officers, directors, employees, legal representatives, heirs, successors, or assigns; and (6) any persons who timely opt-out of the Settlement Class.

1 change its labeling and advertising;

2 (3) requiring Defendant to pay all Valid Claims made by Class Members under the
3 Settlement;

4 (4) awarding a class representative incentive award of \$5,000 each to the named plaintiffs
5 Marek, Dwight, Williams, Gannon, and Eyzaguirre and \$2,500 each to Fike, Waldron,
6 Tempest, and Nogueras; and

7 (5) awarding attorneys' fees and expenses to Plaintiffs' counsel.

8 A copy of the [Proposed] Order Granting Final Approval of Class Action Settlement is
9 attached to the Settlement Agreement as Exhibit D.

10 This Motion is based on Federal Rule of Civil Procedure 23, this Notice of Motion, the
11 supporting Memorandum of Points and Authorities, the Declaration of Seth Safier (the "Safier
12 Decl.") filed herewith, the Declaration of Spencer Sheehan (the "Sheehan Decl.") filed herewith,
13 the Declaration of William Wright (the "Wright Decl.") filed herewith, the Declaration of Steven
14 Weisbrot (the "Weisbrot Decl.") filed herewith, and the pleadings and papers on file in this
15 action, and any other matter of which this Court may take judicial notice.

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1 **I. INTRODUCTION**

2 The Settlement Agreement (hereafter, “Settlement” or “Settlement Agreement”) and its
3 exhibits, filed herewith (Safier Decl. Ex. A), were negotiated following the guidelines provided in
4 the Northern District’s Procedural Guidance for Class Action Settlement (“District Guidelines”)
5 and meet all the criteria for approval under Federal Rule of Civil Procedure (“Rule”) 23.

6 Beginning on or around April 2020, Defendant began manufacturing and selling a hard
7 seltzer product under the brand name “Vizzy” (the “Products”). The Products uniformly and
8 consistently advertise “with antioxidant vitamin C from acerola superfruit” on the front label and
9 packaging. Plaintiffs allege the label claims are unlawful, misleading, and designed to deceive
10 consumers into purchasing Defendants’ Products. Plaintiffs allege that the use of the label claims
11 allowed Defendant to obtain a price premium from consumers. Defendant denies Plaintiffs’
12 allegations and contends that its conduct was not wrong, complied with federal and state law and
13 does not give rise to any liability.

14 After discovery and multiple mediation sessions, Plaintiffs and Defendant agreed to settle
15 Plaintiffs’ claims in this case, as well as the claims in similar cases pending in the Northern
16 District of Illinois and Southern District of Florida. In sum, Defendant has agreed to pay \$9.5
17 million as a common fund to pay refunds to Settlement Class Members, notice and administration
18 costs, incentive awards, and attorneys’ fees and expenses.

19 **II. PROCEDURAL HISTORY**

20 **A. The *Marek* Action**

21 On September 16, 2021, the *Marek* Plaintiffs, by and through their counsel Gutride Safier
22 LLP, filed this action (the “*Marek* Action”). The *Marek* Plaintiffs allege that Defendant violated
23 California law by unlawfully and deceptively marketing and selling the Products with the claim
24 “with antioxidant vitamin C from acerola superfruit” on the front label. They allege that the front
25 label claim is both unlawful and misleading. They further allege that use of the term “with” to
26 indicate the addition of nutrients to the Products subjects the claim to 21 C.F.R. § 101.54(e).
27 Thus, they allege, the Product labels violate 21 C.F.R. § 101.54(e) because they do not comply
28 with the fortification policy in 21 C.F.R. § 104.20. The *Marek* Plaintiffs also allege that the

1 Products’ marketing and labeling is also misleading because reasonable consumers would believe
2 they will receive health benefits from the Product based on the “with antioxidant vitamin C from
3 acerola superfruit” claim, but that consumers will not receive any such benefits. The *Marek*
4 Plaintiffs asserted claims for violations of the California Consumer Legal Remedies Act, Civil
5 Code § 1780, *et seq.* (“CLRA”), false advertising under California Business and Professions Code
6 § 17500, *et seq.*; unfair business practices under California Business and Professions Code §
7 17200, *et seq.*; and fraud, seeking damages, an injunction and other relief. *Marek* Plaintiffs sought
8 to pursue these claims on behalf of themselves and all purchasers of Vizzy products in California
9 (other than resellers) between September 16, 2017, and the present.

10 On January 14, 2022, this Court denied Defendant’s motion to dismiss California
11 Plaintiffs’ claims against Molson Coors Beverage Company USA LLC. Following that decision,
12 *Marek* Plaintiffs conducted discovery, secured production of thousands of pages of documents,
13 obtained critical information pursuant to interrogatories, conducted a 30(b)(6) deposition of
14 Defendant, and engaged and consulted with a damages expert.

15 In conjunction with this motion, the *Marek* Plaintiffs seek leave to amend their complaint
16 to add Brandi Fike of Pennsylvania, Lance Waldron of Colorado, Jessica Tempest of New York,
17 and Vivian Nogueras of Florida as plaintiffs along with claims under Pennsylvania, Colorado,
18 New York, and Florida law in this action for settlement purposes only.

19 **B. The *Williams* Action**

20 On May 22, 2021, Darren Williams, by and through his counsel Sheehan & Associates,
21 P.C. (“Sheehan”), filed a class action complaint in the Northern District of Illinois against Molson
22 Coors Beverage Company USA LLC, entitled *Williams v. Molson Coors Beverage Company*
23 *USA LLC*, No. 21-cv-50207 (the “*Williams* Action”). In the *Williams* Action, the Williams
24 Plaintiffs claim violations of the Magnuson Moss Warranty Act, 15 U.S.C. § 2301, New York
25 General Business Law §§ 349-350, Illinois Consumer Fraud and Deceptive Business Practices
26 Act, 815 ILCS 505/1, negligent misrepresentation, fraud, and unjust enrichment. Williams sought
27 to pursue claims on behalf of himself and all purchasers the Products in Illinois. Gannon sought to
28 pursue claims on behalf of herself and all purchasers of the Products in New York.

1 On September 28, 2021, Defendant moved to dismiss the amended complaint. After the
2 *Williams* Plaintiffs were granted leave to, and did, file a Second Amended Complaint, Defendant
3 moved to dismiss the Second Amended Complaint on December 6, 2021. The court took the
4 motion under advisement, where it remained pending until the parties notified the court that a
5 proposed resolution had been reached. Thereafter, on September 12, 2022, the court issued an
6 order striking the motion without prejudice to refile “in the unlikely event that the parties’
7 settlement discussions are unsuccessful.”

8 The *Williams* Action also proceeded through discovery, where Defendants served
9 interrogatories, requests for production, and took fact depositions of Plaintiffs Williams and
10 Gannon. Fact discovery closed on July 1, 2022. Plaintiffs’ deadline for filing their motion for
11 class certification briefing was set for August 2, 2022.

12 In conjunction with this motion, *Marek* Plaintiffs are filing a motion for leave to amend
13 their complaint to add the plaintiffs and claims from the *Williams* Action into this action for set-
14 tlement purposes only. Following the filing of this motion, Sheehan & Associates will file a stipu-
15 lation of dismissal of the *Williams* Action.

16 C. The *Eyzaguirre* Action

17 On May 11, 2022, Plaintiff Evvie Eyzaguirre, by and through her counsel Sheehan and
18 The Wright Law Office (“Wright”), filed a Class Action Complaint in the United States District
19 Court for the Southern District of Florida (entitled *Eyzaguirre v. Molson Coors Beverage*
20 *Company USA LLC*, Case No. 22-cv-60889) alleging claims for violations of the Florida
21 Deception and Unfair Trade Practices Act, Magnuson Moss Warranty Act, negligent
22 misrepresentation, fraud, and unjust enrichment. Eyzaguirre sought to pursue claims on behalf of
23 herself and all purchasers the Products in Florida, Mississippi, South Carolina, Louisiana, and
24 Arkansas.

25 The parties submitted a notice of settlement and the court stayed the case on October 17,
26 2022.

1 In conjunction with this motion, *Marek* Plaintiffs are filing a motion for leave to amend
2 their complaint to add the plaintiff and claims from the *Eyzaguirre* Action into this action for set-
3 tlement purposes only.

4 **D. Settlement Negotiations**

5 The Parties engaged in extensive settlement discussions before reaching this Settlement.
6 On July 28, 2022, the Parties participated in an all-day mediation conducted by Honorable Jay
7 Gandhi (Ret.) at JAMS. The Parties actively continued settlement efforts over the next few weeks
8 and attended a second mediation with Hon. Jay Gandhi on August 12, 2022. That mediation re-
9 sulted in the settlement memorialized in the Agreement.

10 **III. BENEFITS CONFERRED ON THE CERTIFIED CLASS UNDER THE**
11 **PROPOSED SETTLEMENT.**

12 The Settlement resolves claims between Defendant and the class of United States
13 residents who, during the Class Period, purchased, in the United States, any of the Products,
14 except for purpose of resale during the period of September 16, 2017, through the date of
15 Preliminary Approval. Excluded persons are (1) the Honorable Judge William Orrick, the
16 Honorable Iain D. Johnston, the Honorable Lisa Jensen, the Honorable William P. Dimitrouleas,
17 the Honorable Jay Gandhi (Ret.), and any member of their immediate families; (2) any
18 government entity; (3) Defendant; (4) any entity in which Defendant has a controlling interest; (5)
19 any of Defendant's subsidiaries, parents, affiliates, and officers, directors, employees, legal
20 representatives, heirs, successors, or assigns; and (6) any persons who timely opt-out of the
21 Settlement Class. Under the Settlement Agreement, Class Members (except any such Person who
22 has filed a proper and timely request for exclusion from the Class), will agree to release all
23 Allegations, Claims, or contentions related to the Released Claims.

24 **A. Injunctive Relief**

25 Defendant agrees that, upon Final Approval, the Court shall enter a Permanent Injunction
26 precluding Defendant from using the phrase "with antioxidant vitamin C from acerola superfruit"
27 in any Labeling, Primary Packaging, or Secondary Packaging of any Product, which injunction
28 shall become binding and enforceable against Defendant on the Effective Date. Defendant shall

1 be permitted, at its option, to include acerola cherry on the Ingredient Statement on the Product,
2 to call out “acerola cherry” on front of the Product Label, and to list Vitamin C in compliance
3 with FDA requirements on the Nutrition Facts panel.

4 **B. Cash Payments**

5 Defendant also agreed to create a non-revisionary Settlement Fund of \$9,500,000
6 against which Class Members may file a Claim to receive a Cash Payment of up to the following:
7 five dollars (\$5) per 24-pack Unit of the Product purchased; three dollars (\$3.00) per 12-pack
8 Unit of the Product purchased; and seventy-five cents (\$0.75) per Single Can Unit of the Product
9 purchased for personal use. All claimants that submit a Valid Claim are entitled to a Minimum
10 Cash Payment of \$6.00. However, the actual Cash Payment received may be reduced pro rata de-
11 pending on the number of Valid Claims and the cost of other expenses paid out of the Settlement
12 Fund. If a class member does not provide Proof of Purchase, the claimant can claim a maximum
13 Cash Payment of \$15.00 per Household. “Proof of Purchase” means a receipt or other documen-
14 tation from a third-party retailer (such as a grocery or convenient store) that reasonably estab-
15 lishes the fact and date of purchase of the Product between January 1, 2020 and the date of
16 preliminary approval in the United States. “12-pack Unit” means a single quantity of a 12-pack of
17 the Product as sold at retail, “24-pack Unit” means a single quantity of a 24-pack of the Product
18 as sold at retail, “Single Can Unit” means a single quantity of a 24-ounce can or 16-ounce can of
19 the Product as sold at retail.

20 The Claim Form is simple. The form can be completed online or downloaded and submit-
21 ted by mail, and is designed to be completed in minutes. (Settlement ¶¶ 4.1-4.3 and Exh. A.) It
22 requires no purchase details other than the name and number of Products purchased and approxi-
23 mate month(s) and year(s) of purchase. (Id.)

24 **C. Administrative Expenses, Attorneys’ Fees and Costs, Representative 25 Service Awards**

26 All costs of notice and administration of the Settlement (the “Administration Costs”) will
27 be paid from the Settlement Fund. (Settlement ¶ 4.3.)

28 In addition, Plaintiffs will request payment from the Settlement Fund of Incentive Awards

1 of \$5,000 each for Plaintiffs Marek, Dwight, Williams, Gannon, and Eyzaguirre and \$2,500 each
2 for Plaintiffs Fike, Waldron, Tempest, and Nogueras. (*Id.* ¶ 6.2.) The Incentive Awards are
3 designed to compensate Plaintiffs for (1) the time and risk they took in prosecuting this action
4 (including the risk of liability for Defendant’s costs and for negative attention from the press and
5 on social media) and (2) agreeing to a release broader than the one that will bind settlement class
6 members. (*Id.*)

7 Plaintiffs also will request payment from the Settlement Fund of their out of pocket
8 expenses (approximately \$70,000) plus attorneys’ fees in the amount of \$2,500,000. (*Id.* ¶ 6.1.1)
9 This request is in line with standard awards under other common fund settlements, under which
10 fees are awarded as percentage of the fund, as set out in *Williams v. MGM Pathe Communications*
11 *Corp.*, 129 F.3d 1026 (9th Cir. 1997). The request also is also reasonable under a lodestar-
12 multiplier cross-check. The reasonableness of this request is discussed in Section VIII, *infra*.

13 **IV. THE COURT SHOULD APPROVE THE SETTLEMENT.**

14 **A. Legal Framework**

15 Strong judicial policy favors settlement of class actions. *See Class Plaintiffs v. City of Se-*
16 *attle*, 955 F.2d 1269, 1276 (9th Cir. 1992); *Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1238
17 (9th Cir. 1998). Settlements of complex cases greatly contribute to the efficient utilization of
18 scarce judicial resources and achieve the speedy resolution of justice. “The claims, issues, or de-
19 fenses of a certified class . . . may be settled . . . only with the court’s approval.” Fed. R. Civ. P.
20 23(e). A decision “to approve or reject a settlement is committed to the sound discretion of the
21 trial judge because [s]he is exposed to the litigants, and their strategies, positions, and proof.”
22 *Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.)*, 213 F.3d 454, 459 (9th Cir. 2000). The
23 Court must consider whether the settlement as a whole is reasonable; it stands or falls in its en-
24 tirety. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1101, 1026 (9th Cir. 1998) (“*Hanlon*”). In addi-
25 tion, Rule 23(e) “requires the district court to determine whether a proposed settlement is
26 fundamentally fair, adequate, and reasonable.” *Id.* at 1026. Under Ninth Circuit precedent, the
27 district court must balance a number of factors including:

28 the strength of the plaintiffs’ case; the risk, expense, complexity, and likely dura-
tion of further litigation; the risk of maintaining class action status throughout the

trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

Id. Rule 23(e)(2) similarly requires the district court to consider whether:

(A) the class representatives and Plaintiffs' Counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2). The Court should apply "the framework set forth in Rule 23, while continuing to draw guidance from the Ninth Circuit's factors and relevant precedent." *Hefler v. Wells Fargo & Co.*, No. 16-cv-05479-JST, 2018 U.S. Dist. LEXIS 213045, at *13 (N.D. Cal. Dec. 17, 2018).

B. The Settlement Is Fair, Adequate, and Reasonable

1. Procedural Concerns

The Court must consider whether "the class representatives and Plaintiffs' Counsel have adequately represented the class" and whether "the proposal was negotiated at arm's length." Fed. R. Civ. P. 23(e)(2)(A)-(B). As the Advisory Committee notes suggest, these are "matters that might be described as 'procedural' concerns, looking to the conduct of the litigation and of the negotiations leading up to the proposed settlement." Fed. R. Civ. P. 23(e)(2)(A)-(B) advisory committee's note to 2018 amendment. These concerns implicate factors such as the non-collusive nature of the negotiations, as well as the extent of discovery completed and stage of the proceedings. *See Hanlon*, 150 F.3d at 1026.

a. Adequate Representation of the Class

As discussed more fully in Section V, *supra*, Plaintiffs have no conflicts of interest with

1 the Settlement Class and have invested significant time and resources in this litigation. Plaintiffs’
2 Counsel has successfully represented numerous plaintiff classes, involving a variety of claims, in
3 state and federal courts throughout the country and effectively represented the class interests in
4 this case.

5 **b. Arm’s Length Negotiations**

6 The Ninth Circuit “put[s] a good deal of stock in the product of an arm’s-length, non-col-
7 lusive, negotiated resolution” in approving a class action settlement. *Rodriguez v. West Publ’g*
8 *Corp.*, 563 F.3d 948, 965 (9th Cir. 2009). Class settlements are presumed fair when they are
9 reached “following sufficient discovery and genuine arms-length negotiation,” both of which oc-
10 curred here. *See Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal.
11 2004) (“*DIRECTV*”); 4 Newberg at § 11.24. “The extent of discovery [also] may be relevant in
12 determining the adequacy of the parties’ knowledge of the case.” *DIRECTV*, 221 F.R.D. at 527
13 (quoting *Manual for Complex Litigation, Third* § 30.42 (1995)). “A court is more likely to ap-
14 prove a settlement if most of the discovery is completed because it suggests that the parties ar-
15 rived at a compromise based on a full understanding of the legal and factual issues surrounding
16 the case.” *DIRECTV*, 221 F.R.D. at 527 (quoting 5 *Moore’s Federal Practice*, §23.85[2][e] (Mat-
17 thew Bender 3d ed.)).

18 Here, before agreeing upon the terms of the Settlement, the parties engaged in extensive
19 factual investigation, which included document productions and interrogatories served and
20 answered by the Parties. *Safier Decl.* ¶¶ 8-14. The parties also undertook briefing and argument
21 on various significant legal issues. *Id.* ¶¶ 6-7. The record was thus sufficiently developed that the
22 parties were informed as to the Court’s views regarding viability of the claims and able to
23 adequately evaluate the strengths and weaknesses of their respective positions and risks to both
24 sides if the case did not settle. *Id.* ¶ 19.

25 The parties negotiated the proposed Settlement in good faith with the assistance of an
26 independent experienced mediator, the Honorable Jay Gandhi (Ret.). *Id.* ¶ 20. “The assistance of
27 an experienced mediator in the settlement process confirms that the settlement is non-collusive.”
28 *Adams v. Inter-Con Sec. Sys. Inc.*, No. C-06-5428-MHP, 2007 U.S. Dist. LEXIS 83147 at *3

(N.D. Cal. Oct. 30, 2007); *see also Rabin v. PricewaterhouseCoopers LLP*, No. 16-cv-02276-JST, 2020 U.S. Dist. LEXIS 211546, at *25 (N.D. Cal. Aug. 19, 2020) (finding a settlement was non-collusive where the parties participated in two arms-length settlement negotiations overseen by experienced and neutral mediators).

2. Substantive Concerns

Rule 23(e)(2)(C) and (D) set forth factors for conducting “a ‘substantive’ review of the terms of the proposed settlement.” Fed. R. Civ. P. 23(e)(2)(C)-(D) advisory committee’s note to 2018 amendment. In determining whether “the relief provided for the class is adequate,” the Court must consider “(i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney’s fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3).” Fed. R. Civ. P. 23(e)(2)(C). In addition, the Court must consider whether “the proposal treats class members equitably relative to each other.” Fed. R. Civ. P. 23(e)(2)(D). Plaintiffs also must identify and explain any differences between the class proposed in the complaint and the Settlement Class and between the claims in the complaint and the Released Claims, and discuss the effect of the Settlement on the *Marek* Action. District Guidelines ¶ 1(a), (b), (d).³

a. Strength of Plaintiffs’ Case and Risks of Continued Actions.

In determining the likelihood of a plaintiff’s success on the merits of a class action, “the district court’s determination is nothing more than an amalgam of delicate balancing, gross approximations and rough justice.” *Officers for Justice*, 688 F.2d at 625 (internal quotations omitted). The court may “presume that through negotiation, the Parties, counsel, and mediator arrived at a reasonable range of settlement by considering Plaintiff’s likelihood of recovery.” *Garner v. State Farm. Mut. Auto. Ins. Co.*, 2010 WL 1687832, at *9 (N.D. Cal. Apr. 22, 2010) (citing *Rodríguez v. West Publ’g Corp.*, 563 F.3d 9448, 965 (9th Cir. 2009)).

³ An explanation of the potential recovery and the discount between those amounts and the Settlement Amount is provided in section IV.B.2(a), pursuant to District Guidelines 1(c). A summary of the allocation plan, an estimate of the expected Valid Claims, and confirmation that no portion of the Settlement Amount will revert to Defendant are provided in sections III.B and IV.B.2(b), pursuant to District Guidelines 1(e), (f), and (g).

1 In considering whether to enter into the Settlement, Plaintiffs, represented by counsel expe-
2 rienced in class action litigation, weighed the risks inherent in establishing all the elements of
3 their claims in a jury trial, as well as the expense of trial and likely duration of post-trial motions
4 and appeals. Plaintiffs agreed to settle this litigation on these terms based on their careful investi-
5 gation and evaluation of the facts and law relating to Plaintiffs' allegations and consideration of
6 the facts and views expressed by the mediators and Defendant during the settlement negotiations.
7 *See Louie v. Kaiser Found. Health Plan, Inc.*, No. 08-cv-0795, 2008 U.S. Dist. LEXIS 78314, at
8 *6 (S.D. Cal. Oct. 6, 2008) ("Plaintiff's Counsels' extensive investigation, discovery, and re-
9 search weighs in favor of preliminary settlement approval.").

10 Plaintiffs and Plaintiffs' Counsel were aware that, in order to prevail at trial, they would
11 have to prove that Defendant's labeling and advertisements were unlawful and misleading; that
12 consumers relied on the misrepresentations; the representations caused injuries; and that there
13 were recoverable damages or restitution for the Class. Defendant also would likely oppose class
14 certification. Although Plaintiffs believe the evidence obtained in discovery established the pre-
15 requisites for certification as well as Defendant's liability and damages, Defendant vigorously de-
16 nies those allegations. Among other things, Defendant was prepared to argue that its labeling
17 advertising was truthful and not misleading to a reasonable consumer, and that applicable federal
18 regulations did not prohibit labeling of the product in the way it did. Further, Plaintiffs faced chal-
19 lenges in certifying a class and, if a class or classes were certified, establishing the amount of
20 class-wide damages.

21 While Plaintiffs' Counsel is confident in its positions and believe Plaintiffs' claims are
22 strong, Plaintiffs' Counsel is also experienced and realistic enough to know that the recovery and
23 certainty achieved through settlement, as opposed to the uncertainty inherent in the trial and ap-
24 pellate process, weighs heavily in favor of settlement, particularly given the above risks, which
25 could easily have impeded Plaintiffs' successful prosecution at trial and in an eventual appeal.
26 *Safier Decl.* ¶¶ 27-30. Under the circumstances, Plaintiff and Plaintiffs' Counsel appropriately de-
27 termined that the instant settlement outweighs the gamble of continued litigation. *Id.* Moreover,
28 even if Plaintiffs prevailed at trial, any recovery could be delayed for years by an appeal. *Id.*

1 Thus, even in the best case, it could take years to secure any meaningful relief for Class Mem-
2 bers. *See Lipuma v. American Express Company*, 406 F. Supp. 2d 1298, 1322 (S.D. Fla. 2005)
3 (likelihood that appellate proceedings could delay class recovery “strongly favor[s]” approval of a
4 settlement).

5 Further, a comparison of the Settlement award to the potential damages that might be re-
6 covered for the Class at trial, given the risks of the litigation, supports the reasonableness of the
7 Settlement. *See* N.D. Cal. Guide ¶1(d) (preliminary approval motion should set forth “potential
8 recovery if plaintiffs were to prevail” and “likely recovery per plaintiff” under the settlement).
9 Plaintiffs’ damages expert has opined that the price premium associated with the claim is eleven
10 percent (11%). Safer Decl. ¶ 16. Defendant has provided evidence that total, gross sales of the
11 Product to its distributors during the class period is at least [REDACTED] *Id.* ¶ 23. Thus, if Plaintiffs re-
12 covered the entire amount of monetary damages under the price premium model, the maximum
13 potential recovery available to Class Members would be approximately [REDACTED] *Id.* Even after trial,
14 Defendant might be successful at arguing that Class Members were not entitled to monetary com-
15 pensation for their purchase of the Products. *See Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121,
16 1131-32 (9th Cir. 2017) (“Rule 23 specifically contemplates the need for such individualized
17 claim determinations after a finding of liability.”). Under the Settlement, Class Members can ob-
18 tain Cash Payments of up to (1) five dollars (\$5) per 24-pack Unit of the Product purchased; three
19 dollars (\$3.00) per 12-pack Unit of the Product purchased; and seventy-five cents (\$0.75) per Sin-
20 gle Can Unit of the Product purchased. With a modelled eleven-percent price premium, a Settle-
21 ment Class Member who purchased one 12-pack Unit at \$16.99 would be eligible for only \$1.87,
22 but under the Settlement, the same individual will receive \$6.00. And, although the \$9.5 million
23 Settlement Fund is less than the maximum amount Plaintiffs could recover if fully successful at
24 trial, it is reasonable in light of the risks of proceeding to trial. Moreover, even if Plaintiffs won at
25 trial, Class Members would still need to file claims in order to receive compensation as Defendant
26 has no records of individual purchasers, and the recovery would likely be lower. The Settlement
27 is a very favorable outcome given the substantial risks of continuing with this complex litigation,
28

1 and the uncertainty inherent in trial, as well as the advantages of obtaining an immediate benefit
2 for Class Members and avoiding the substantial expenses of further litigation.

3 The Settlement release is no broader than a *res judicata* release that would be obtained af-
4 ter trial. The Settlement releases only claims that were or could have been asserted regarding
5 Product purchases during the Class Period—the very issues in suit. *See Allied Fire Prot. v. Diede*
6 *Constr., Inc.*, 127 Cal. App. 4th 150, 155 (2005) (“Res judicata serves as a bar to all causes of ac-
7 tion that were litigated or that could have been litigated in the first action.”); *see also In re An-*
8 *them, Inc. Data Breach Litig.*, 327 F.R.D. 299, 327 (N.D. Cal. 2018) (“the Ninth Circuit allows
9 federal courts to release not only those claims alleged in the complaint, but also claims ‘based on
10 the identical factual predicate as that underlying the claims in the settled class action.’”) (quot-
11 ing *Hesse v. Sprint Corp.*, 598 F.3d 581, 590 (9th Cir. 2010)). Any Class Member’s claims for
12 personal injury against Defendant are specifically excluded from the Released Claims.

13 **b. Effectiveness of Distribution Method**

14 The Court must consider “the effectiveness of [the] proposed method of distributing relief
15 to the class.” Fed. R. Civ. P. 23(e)(2)(C)(ii). Class Members who seek a Cash Payment need only
16 submit a relatively simple Claim Form, an election of payment method, and a certification of the
17 information included on the Claim Form. (Settlement Agreement, ¶ 4.5 and Exh. A.) The Claim
18 Form can be completed online, or Class Members have the option to print and mail the Claim
19 Form to the Claim Administrator. (Settlement ¶ 4.3.) Cash Payments will be made by digital dis-
20 tribution or mailed check. This procedure is claimant-friendly, efficient, cost-effective, propor-
21 tional and reasonable. Pursuant to N.D. Cal. Guide ¶1(g), Plaintiffs’ Counsel estimates, based on
22 its experiences with recent settlements in other cases and the input of the Claims Administrator,
23 approximately 5% (or approximately 98,950) Class Members will submit a Claim. Safier Decl.
24 ¶ 54; Weisbrot Decl. ¶ 40.

25 Except if the Settlement is terminated pursuant to Paragraphs 7.13 and 7.15 of the Agree-
26 ment, no portion of the Settlement Amount will revert to Defendant. After distributions of Cash
27 Payments, Notice and Administration Expenses, Attorneys’ Fees and Expenses, and Incentive
28

1 Awards, any money that remains shall be paid to a *cy pres* recipient, National Advertising Divi-
2 sion (“NAD”). Settlement ¶ 4.4.

3 “NAD holds national advertising across all media types to high standards of truth and
4 accuracy by reviewing truth-in-advertising challenges from businesses, trade associations, con-
5 sumers, or on its own initiative.” See [https://bbbprograms.org/programs/all-programs/national-](https://bbbprograms.org/programs/all-programs/national-advertising-division)
6 [advertising-division](https://bbbprograms.org/programs/all-programs/national-advertising-division). An award to this *cy pres* recipient, if one results from the Settlement, would
7 be guided by “(1) the objectives of the underlying statute(s) and (2) the interests of the silent class
8 members,” and would not benefit a group too remote from the Class. See *Flores v. TFI Int’l, Inc.*,
9 No. 12-cv-05790-JST, 2019 U.S. Dist. LEXIS 65754, at *24-25 (N.D. Cal. Apr. 17, 2019).

10 **c. Terms of Attorneys’ Fees**

11 Plaintiffs’ Counsel seeks an award of attorneys’ fees and costs. That request is addressed
12 in Section VIII, *infra*.

13 **d. Equitable Treatment of Class Members**

14 All Class Members are entitled to the same relief under the Settlement. Even though Prod-
15 ucts may have been sold at different prices based on size or retail location, the alleged premium is
16 always 11%, and uniform relief makes it unnecessary for claimants to attest to how much they
17 paid for each purchase and makes the Settlement administratively efficient. The Settlement also
18 provides for an Incentive Award for the Plaintiffs, which is explained in Section F, *infra*.

19 **e. Counsel’s Experience**

20 Although not articulated as a separate factor in Rule 23(e), courts have given considerable
21 weight to the opinion of experienced and informed counsel who support settlement. See *DI-*
22 *RECTV*, 221 F.R.D. at 528; see also *In re NVIDIA Corp. Derivative Litig.*, No. C-06-06110-SBA,
23 2008 U.S. Dist. LEXIS 117351 at *4 (N.D. Cal. Dec. 22, 2008); *Kirkorian v. Borelli*, 695 F.
24 Supp. 446, 451 (N.D. Cal. 1988). In deciding whether to approve a proposed settlement of a class
25 action, “[t]he recommendations of plaintiffs’ counsel should be given a presumption of reasona-
26 bleness.” *Stewart v. Applied Materials, Inc.*, No. 15-cv-02632-JST, 2017 U.S. Dist. LEXIS
27 137130 at *6 (N.D. Cal. Aug. 25, 2017); accord *Omnivision*, 559 F. Supp. 2d at 1043 (same).
28

1 Deference to Class Counsel’s evaluation of the Settlement is proper because “[p]arties repre-
2 sented by competent counsel are better positioned than courts to produce a settlement that fairly
3 reflects each party’s expected outcome in litigation.” *Rodriguez*, 563 F.3d at 967. Here, the Settle-
4 ment was negotiated by counsel with extensive experience in consumer class action litigation. *See*
5 *Safier Decl.* ¶ 18, and Ex. 2, Ex. 4; *Sheehan Decl.*, ¶ 5, and Ex. 1; and *Wright Decl.* ¶ 5, and Ex.
6 1. Based on their experience, Plaintiffs’ counsel concluded that the Settlement provides excep-
7 tional results for the Class while sparing the Class from the uncertainties of continued and pro-
8 tracted litigation. Defendant is also represented by seasoned, class-action litigators who support
9 the settlement. *Safier Decl.* ¶ 19.

10 **f. Past Distributions**

11 The information requested by N.D. Cal. Guide ¶ 11 regarding past distributions in other
12 comparable class settlements is provided in the *Safier Declaration*. *Safier Decl.* ¶ 54 and Ex. 4.

13 **V. THE COURT SHOULD CONDITIONALLY CERTIFY THE SETTLEMENT**
14 **CLASS**

15 The Ninth Circuit has recognized that certifying a settlement class to resolve consumer
16 lawsuits is a common occurrence. *Hanlon*, 150 F.3d at 1019. When presented with a proposed
17 settlement, a court must first determine whether the proposed settlement class satisfies the re-
18 quirements for class certification under Rule 23. In assessing those class certification require-
19 ments, a court may consider that there will be no trial. *Amchem Prods., Inc. v. Windsor*, 521 U.S.
20 591, 620 (1997) (“Confronted with a request for settlement-only class certification, a district court
21 need not inquire whether the case, if tried, would present intractable management problems ... for
22 the proposal is that there be no trial.”). For the reasons below, the proposed Settlement Class
23 meets the requirements of Rule 23(a) and (b).

24 The Class consists of all United States residents who purchased any Vizzy hard seltzer
25 beverages from January 1, 2020 to present. Settlement ¶ 2.54. Excluded persons are (1) the
26 Honorable Judge William Orrick, the Honorable Iain D. Johnston, the Honorable Lisa Jensen, the
27 Honorable William P. Dimitrouleas, the Honorable Jay Gandhi (Ret.), and any member of their
28 immediate families; (2) any government entity; (3) Defendant; (4) any entity in which Defendant

1 has a controlling interest; (5) any of Defendant’s subsidiaries, parents, affiliates, and officers,
2 directors, employees, legal representatives, heirs, successors, or assigns; and (6) any persons who
3 timely opt-out of the Settlement Class. Under the Settlement Agreement, Class Members (except
4 any such Person who has filed a proper and timely request for exclusion from the Class), will
5 agree to release all Allegations, Claims, or contentions related to the Released Claims. *Id.* ¶ 2.19.

6 When a class settlement occurs before class certification has taken place, a court may
7 conditionally certify an action for settlement purposes. *See In re Wireless*, 253 F.R.D. 630, 633
8 (S.D. Cal. 2008) (“parties may settle a class action before class certification and stipulate that a
9 defined class be conditionally certified for settlement purposes”). When certification is sought
10 under Rule 23(a) and (b)(3), the Court’s threshold task is to preliminarily determine whether the
11 proposed settlement class satisfies the numerosity, commonality, typicality and adequacy
12 requirements of Rule 23(a), and the predominance and superiority requirements of Rule 23(b)(3).
13 *Id.* Here, the parties seek approval, for settlement purposes only, of a nationwide Settlement Class
14 so that relief can be afforded to all consumers. All of the class certification elements are met here.

15 Numerosity is satisfied because [REDACTED] were sold to the Settlement
16 Class (Safier Decl. ¶ 23) and “joinder of all members is impracticable.” Rule 23(a)(1); *see Can-*
17 *ada Dry*, 326 F.R.D. at 607 (“[I]t is clear that the class is sufficiently numerous. Dr. Pepper sold
18 millions of units of Canada Dry during the class period.”).

19 Typicality under Rule 23(a)(3) is a “permissive” standard that requires only that the repre-
20 sentatives’ claims be “reasonably coextensive with those of absent class members; they need not
21 be substantially identical.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). There
22 is only one labeling statement at issue that is identical across all Products. Plaintiffs are typical
23 because they were deceived as a result of Defendant’s unlawful and misleading labeling of the
24 Products and therefore suffered the same injury as the rest of the Class.

25 Adequacy under Rule 23(a)(4) concerns whether the class representatives will “fairly and
26 adequately protect the interests of the class.” This inquiry involves two questions: “(1) do the
27 named plaintiffs and their counsel have any conflicts of interest with other class members and
28 (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the

1 class?” *Hanlon*, 150 F.3d at 1020. Both requirements are met here. All of Plaintiffs’ interests are
2 in line with the interests of the Class because they seek the same relief as the Class, based upon
3 the same claims and uniform business practices. Plaintiffs have also vigorously prosecuted this
4 action, as shown by their retention of experienced, competent counsel, production of documents
5 and responses to interrogatories, and Plaintiffs’ participation in the negotiation of the Settlement.
6 Plaintiffs also assumed the risk of bearing Defendant’s costs should the litigation have ultimately
7 been unsuccessful. *Safier Decl.* ¶ 52.

8 Plaintiffs’ Counsel is competent and qualified to represent the Class. Plaintiffs’ Counsel
9 has extensive experience with complex class actions, having served as Plaintiffs’ Counsel in nu-
10 merous federal and state court consumer fraud actions that have resulted in millions of dollars be-
11 ing returned to consumers. *Id.* ¶ 18 and Exs. 2, 4; *Sheehan Decl.* ¶ 5 and Ex. 1; *Wright Decl.* ¶ 5
12 and Ex. 1. Numerous courts have repeatedly found Plaintiffs’ Counsel to be adequate class coun-
13 sel, including many in this District. *Id.*

14 Commonality under Rule 23(a)(2) is established if plaintiff’s and class members’ claims
15 “depend on a common contention...capable of class-wide resolution . . . meaning that determina-
16 tion of its truth or falsity will resolve an issue that is central to the validity of each one of the
17 claims in one stroke.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). Because the
18 commonality requirement may be satisfied by a single common issue, it is easily met. 1 NEW-
19 BERG ON CLASS ACTIONS § 3.10, at 3-50 (1992). Here, that “common question” is: was Defend-
20 ant’s “with antioxidant vitamin C from acerola superfruit” label likely to deceive reasonable
21 consumers?”

22 Under Rule 23(b)(3), the question becomes whether “common questions predominate over
23 individual ones.” *Id.* at 611. Here, there are numerous common questions, all of which predomi-
24 nate over any individualized issues, including: (1) whether Defendant’s marketing and advertising
25 materials were likely to deceive reasonable consumers, (2) whether Defendant’s Labeling was un-
26 lawful; (3) the amount of the price premium associated with the misleading Labeling; (3) whether
27 Class Members are entitled to injunctive and other equitable relief and, if so, what is the nature of
28

1 such relief; and (4) whether Class Members are entitled to payment of actual, incidental, conse-
2 quential, exemplary and/or statutory damages plus interest thereon. Defendant sold the same
3 Products nationwide with the same Labeling, using the same manufacturing and distribution prac-
4 tices. Regardless of the state, Plaintiffs allege that the “with antioxidant vitamin C from acerola
5 superfruit” statement is unlawful and misleading. Accordingly, this claim will present uniform
6 issues of material fact for Class Members nationwide, including whether the Labeling was likely
7 to deceive, whether it was material to reasonable consumers, and whether a price premium can be
8 demonstrated using the conjoint damages model.

9 Finally, Rule 23(b)(3)’s superiority analysis essentially looks to alternative methods of adju-
10 dication and whether maintenance of a class action would be fair and efficient. *See Valentino v*
11 *Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir 1996); 2 Newberg at § 4.27. Superiority is sat-
12 isfied in the present case because: (1) prosecuting or defending separate actions at this stage
13 would be impractical and inefficient; and (2) to the parties’ knowledge, there is no other litigation
14 concerning this controversy. *See Fed. R. Civ. Proc.*, Rule 23(b)(3). Here, there are a multitude of
15 consumers who were injured in small amounts. This “small individual damages” factor is signifi-
16 cant and weighs heavily in favor of class certification, especially given the common scheme at
17 issue. *See Miletak v. Allstate Ins. Co.*, No. C 06-03778 JW, 2010 U.S. Dist. LEXIS 26913, at *36
18 (N.D. Cal. Mar. 5, 2010); *see also Canada Dry*, 326 F.R.D. at 616 (finding class action mecha-
19 nism superior to resolve claims).

20 **VI. THE PROPOSED NOTICE PROGRAM PROVIDES ADEQUATE NOTICE**

21 The proposed Claim Form and Notice Plan, which are attached to the Settlement as Exhib-
22 its A and B, comport with the procedural and substantive requirements of Rule 23 and the N.D.
23 Cal. Guide. Under Rule 23, due process requires that Class Members receive notice of the Settle-
24 ment using the best notice that is “practicable under the circumstances.” *See Fed. R. Civ. P.*
25 *23(c)(2)(B)*. The mechanics of the notice process are left to the discretion of the Court, subject
26 only to the broad “reasonableness” standards imposed by due process. *See 7A Wright & Miller,*
27 *FEDERAL PRACTICE & PROCEDURE* § 1786 (3d ed. 2008); *see also Rosenberg v. I.B.M.*, No. CV-
28

1 06-00430-PJH, 2007 U.S. Dist. LEXIS 53138 at *5 (N.D. Cal. July 12, 2007) (notice should in-
2 form class members of essential terms of settlement including claims procedure and their rights to
3 accept, object or opt-out of settlement); N.D. Cal. Guide ¶¶ 3-5 (identifying information to be in-
4 cluded in notice). In this Circuit, it has long been the case that a notice of settlement will be ad-
5 judged satisfactory if it “generally describes the terms of the settlement in sufficient detail to alert
6 those with adverse viewpoints to investigate and to come forward and be heard.” *Churchill*, 361
7 F.3d 566, 575 (9th Cir. 2004) (citing *Mendoza v. Tucson Sch. Dist. No.1*, 623 F.3d 1338, 1352
8 (9th Cir. 1980)). The proposed Notice Plan satisfies these content requirements and is designed to
9 reach a high percentage of the Class.

10 Notice of the Settlement is to be provided to the Class as follows: (1) published notice in
11 People Magazine and USA Today (California Regional edition); (2) online notice to be published
12 on internet sites through an appropriate programmatic network, social media, and a paid search
13 campaign for a total of at least 5.2 million combined impressions; (3) published notice issued as a
14 press release through GlobeNewswire (or a similar press release distribution service); and
15 (4) sponsored listings on two leading class action settlement websites (www.topclassactions.com
16 and www.classaction.org), postings by a social media influencer, and active listening on Face-
17 book, Instagram and Twitter. Settlement Agreement. *See* Settlement Agreement Exhibit B.

18 The proposed notices inform Class Members about the proposed settlement; a summary of
19 settlement benefits; their right to opt out and the information required by N.D. Cal. Guide ¶ 4 re-
20 garding opt outs; their right to object and the information required by N.D. Cal. Guide ¶ 5 regard-
21 ing objections; the opportunity to file a Claim to obtain a Cash Payment; and the prospective
22 request for attorneys’ fees, costs and Incentive Awards. The published notices refer Class Mem-
23 bers to the Settlement Website where they can obtain the Long Form Notice, which provides
24 more details about the Actions and the Settlement, online and printable versions of the Claim
25 Form and the opt out forms, a fuller discussion of the Released Claims, and methods to obtain ad-
26 ditional information. In addition, the Settlement Website will also contain a contact information
27 page that will include address and telephone numbers for the Claim Administrator and Plaintiffs’
28

1 Counsel, the Settlement Agreement, the date of the Final Approval hearing, the motion for ap-
2 proval and for attorneys' fees and any other important documents in the case. Further, the Claim
3 Administrator will provide a toll-free telephone number at which Class Members can obtain more
4 information.⁴

5 As explained in the declaration from the Claim Administrator filed herewith, this multi-
6 communication method is expected to reach at least 80% of the Class Members an estimated
7 average of 3.28 times each, and it is the best notice practicable. *See* Weisbrot Decl. ¶¶ 12-14. *See,*
8 *e.g., In re Google Referrer Header Privacy Litig.*, No. 5:10-cv-04809, 2014 WL 1266091, *7
9 (N.D. Cal. Mar. 26, 2014) (where direct individual notice not practical, "publication or something
10 similar is sufficient to provide notice to the individuals that will be bound by the judgment"); *see*
11 *also In re Tableware*, 484 F. Supp. 2d 1078, 1080 (N.D.Cal. 2007) (approving settlement;
12 holding that where defendant does not maintain complete lists of all class members, notice via
13 publication is "reasonable").

14 The Class Action Fairness Act requires that Defendant give notice of the proposed class
15 action settlement to appropriate state and federal officials and supply all of the information and
16 documents set forth in 28 U.S.C. § 1715 (b)(1)-(8). The Claim Administrator will do so within ten
17 days after the Settlement Agreement is filed with the Court. Settlement ¶ 5.7; Weisbrot Decl. ¶
18 39.

19 **VII. APPROVAL OF THE CLAIMS ADMINISTRATOR**

20 The Settlement will be administered by a well-known, independent claims administrator,
21 Angeion Group. The additional information required by District Guidelines ¶ 2 regarding the
22 selection of Angeion is provided in the accompanying Safier Declaration (Safier Decl. ¶ 53) and
23 regarding Angeion's data policies and costs is provided in the accompanying Weisbrot Declara-
24 tion (Weisbrot Decl. ¶¶ 41-46, 51).

25 **VIII. APPROVAL OF THE REQUEST FOR ATTORNEYS' FEES AND EXPENSES.⁵**

26 ⁴ Direct notice is not possible because relevant sales occur through third-party retailers and there-
27 fore Defendant does not have or maintain records of consumer purchases.

28 ⁵ Under the Settlement Agreement, Defendant agreed that it would not oppose Plaintiffs' request
for a Fee Award that does not exceed \$2,500,000 provided that the Court grants Final Approval
of the settlement. Settlement Agreement ¶ 6.3.

1 Plaintiff requests the payment of actual expenses in the amount of approximately \$70,000
2 and attorneys' fees in the amount of \$2,500,000. Under Ninth Circuit standards, it is appropriate
3 for a District Court to analyze an attorneys' fee request and issue an award either based on (1) the
4 "lodestar" method or (2) by making an award as a percentage of the total benefit made available
5 to the settlement class, including costs, fees, and injunctive relief. *See e.g., Bluetooth Headset*
6 *Prods. Liability Litig.*, 654 F.3d 935, 941 (9th Cir. 2011); *Nwabueze v. AT&T, Inc.*, No. C 09-
7 01529 SI, 2014 WL 324262, at *2-3 (N.D. Cal. Jan. 29, 2014); *Lopez v. Youngblood*, No. CV-F-
8 07-0474 DLB, 2011 WL 10483569, at *11-12 (E.D. Cal. Sept. 2, 2011). Plaintiffs' fee request is
9 reasonable under either of these approaches. Further, an attorney is entitled to "recover as part of
10 the award of attorney's fees those out-of-pocket that would normally be charged to a fee paying
11 client." *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (internal quotation marks and citation
12 omitted). To support an expense award, plaintiffs should file an itemized list of their expenses by
13 category, listing the total amount advanced for each category, allowing the Court to assess
14 whether the expenses are reasonable. *See Wren v. RGIS Inventory Specialists*, No. 06-cv-05778-
15 JCS, 2011 WL 1230826, at *30 (N.D. Cal. Apr. 1, 2011); District Guidelines ¶ 6.

16 **A. Plaintiffs' Counsel's Requested Fee Is A Reasonable Percentage of the Total**
17 **Benefit Made Available To the Class.**

18 In the Ninth Circuit, the benchmark for an attorney fee is 25% of the total settlement value.
19 *See Six Mexican Workers v. Arizona Citrus Workers*, 904 F.2d 1301, 1311 (9th Cir. 1990); *see*
20 *also Glass v. UBS Fin. Servs., Inc.*, No. C-06-4068 MMC, 2007 WL 221862, at *14 (N.D. Cal.
21 Jan. 26, 2007) ("The Ninth Circuit has repeatedly held that 25% of the gross settlement amount is
22 the benchmark for attorneys' fees awarded under the percentage method . . ."). Here, Class Coun-
23 sel requests an award of attorneys' fee of \$2,500,00, or 26% of the Settlement Amount (\$9.5M),
24 which does not include the value of injunctive relief.

25 In awarding fees, Ninth Circuit precedent requires courts to award class counsel fees based
26 on the total benefits being made available to class members rather than the amount actually
27 claimed. *Young v. Polo Retail, LLC*, No. C-02-4546 WRW, 2007 WL 951821, at *8 (N.D. Cal.
28 Mar. 28, 2007) (citing *Williams v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026 (9th Cir. 1997))

1 (“district court abused its discretion in basing attorney fee award on actual distribution to class”
2 instead of amount being made available)); *see also Nwabueze*, 2014 WL 324262, at *3 (calculat-
3 ing overall value of settlement to be \$100 million if all class members requested billing summar-
4 ies provided in settlement); *Glass*, 2007 WL 221862, at *16 (“The Ninth Circuit has held,
5 however, that the district court must award fees as a percentage of the entire fund, or pursuant to
6 the lodestar method, not on the basis of the amount of the fund actually claimed by the class.”)
7 (citing *Williams*), *aff’d*, 331 F. App’x 452 (9th Cir. 2009); *Dennings v. Clearwire Corp.*, No.
8 C10-1859JLR, 2013 WL 1858797, at *7 (W.D. Wash. May 3, 2013) (“Under Ninth Circuit law,
9 there is strong support that, when a court conducts a percentage fee analysis, it is the amount or
10 value made available to the class, not the amount actually claimed, that is relevant.”) (citing *Wil-*
11 *liams* and *Stern v. Gambello*, 480 F. App’x 867, 870 (9th Cir.2012)) *aff’d* (Sept. 9, 2013)).

12 **B. As a Cross-Check, Plaintiffs’ Counsel’s Requested Fee Is Also Reasonable**
13 **When Using The Lodestar Approach.**

14 Under the lodestar approach, “[t]he lodestar (or touchstone) is produced by multiplying
15 the number of hours reasonably expended by counsel by a reasonable hourly rate.” *Lealao v. Ben-*
16 *eficial California, Inc.*, 82 Cal. App. 4th 19, 26 (2000); *see also Kelly v. Wengler*, 822 F.3d 1085,
17 1099 (9th Cir. 2016) (“[A] court calculates the lodestar figure by multiplying the number of hours
18 reasonably expended on a case by a reasonable hourly rate. A reasonable hourly rate is ordinarily
19 the ‘prevailing market rate [] in the relevant community.’”) (alteration in original) (internal cita-
20 tion omitted) (quoting *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 551 (2010)). Once the
21 court has fixed the lodestar, it may increase or decrease that amount by applying a positive or
22 negative “multiplier to take into account a variety of other factors, including the quality of the
23 representation, the novelty and complexity of the issues, the results obtained and the contingent
24 risk presented.” *Lealao*, 82 Cal. App. 4th at 26; *see also Serrano v. Priest* (“*Serrano III*”), 20 Cal.
25 3d 25, 48-49 (1977); *Ramos v. Countrywide Home Loans, Inc.* 82 Cal. App. 4th 615, 622 (2000);
26 *Beasley v. Wells Fargo Bank*, 235 Cal. App. 3d 1407, 1418 (1991) (multipliers are used to com-
27 pensate counsel for the risk of loss, and to encourage counsel to undertake actions that benefit the
28 public interest).

1 Plaintiffs' Counsel's lodestar through the date of this motion is approximately
2 \$758,746.00. *See* Safier Decl. ¶ 33; Sheehan Decl. ¶¶ 11-12; Wright Decl. ¶ 10. Plaintiffs' Coun-
3 sel's efforts to date included, without limitation: (1) significant pre-filing investigation; (2) draft-
4 ing and filing the class action complaints and amended complaints in three separate Actions;
5 (3) drafting and filing case management conference statements and case management stipulations;
6 (4) drafting discovery requests and responses; (5) meeting-and-conferring with Defendant's coun-
7 sel regarding the scope of discovery, the sufficiency of discovery responses and production, depo-
8 sition notices, Defendant's searches for electronically stored information, the terms and scope of a
9 stipulated protective order, the terms and scope of a stipulated electronically stored information
10 order, and the timing of production; (6) reviewing documents produced by Defendant; (7) con-
11 ducting Defendant's 30(b)(6) deposition; (8) preparing Plaintiffs for depositions; (9) selecting,
12 engaging, and working with a damages expert to prepare and interpret consumer survey results;
13 (10) drafting a mediation statement and participating in two mediation sessions before Hon. Jay
14 Gandhi; (11) negotiating and drafting the Settlement Agreement along with corresponding docu-
15 ments, including the claim form and notice forms; and (12) drafting this motion for approval and
16 supporting documents, including a proposed preliminary approval order and a proposed final
17 judgment. Safier Decl. ¶¶ 5-16. Before the Final Approval Hearing, Plaintiffs' Counsel's efforts
18 will also include, without limitation: (13) reviewing and responding to correspondence from Class
19 Members; (14) supervising the work of the Claims Administrator; (15) researching and drafting a
20 reply memorandum and opposing objections, if any; and (16) appearing at the Preliminary Ap-
21 proval Hearing. *Id.* ¶ 51.

22 Plaintiffs' Counsel calculated their lodestar using their regular billing rates, which for the
23 attorneys involved range from \$450 to \$1,280 per hour and for the paralegals range from \$315 to
24 \$3400 per hour. Safier Decl. ¶ 33; Sheehan Decl. ¶¶ 11-12; Wright Decl. ¶ 10. Plaintiffs' Counsel
25 includes graduates of top law schools (including Yale, Harvard, and NYU), and the principal
26
27
28

1 work was performed by lawyers with 6 or more years of experience.⁶ Safier Decl. ¶ 48. “Affida-
2 vits of the plaintiff[s] attorney and other attorneys regarding prevailing fees in the community,
3 and rate determinations in other cases, particularly those setting a rate for the plaintiff[s] attor-
4 ney, are satisfactory evidence of the prevailing market rate.” *United Steelworkers of Am. v.*
5 *Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990). For attorneys and staff at the GSLLP
6 firm, these hourly rates are equal to or below market rates in San Francisco for attorneys of Plain-
7 tiffs’ Counsel’s background and experience. Safier Decl. ¶¶ 49, Ex. 2. Additionally, the rates
8 charged by Plaintiffs’ Counsel have been deemed reasonable in connection with the approval
9 their fee applications in at least twelve recent matters. *Id.* ¶¶ 36-47. Courts in other cases over the
10 past several years have also approved similar fees charged by other firms. *See Elder v. Hilton*
11 *Worldwide Holdings, Inc.*, No. 16-cv-00278-JST, 2021 U.S. Dist. LEXIS 204099, at *24-25
12 (N.D. Cal. Feb. 4, 2021) (approving rates of \$800 and \$1,000 for senior attorneys); *In re Anima-*
13 *tion Workers Antitrust Litig.*, 2016 U.S. Dist. LEXIS 156720, 2016 WL 6663005, at *6 (N.D.
14 Cal. Nov. 11, 2016) (approving hourly rates of senior attorneys of between \$845 and \$1,200); *In*
15 *re Optical Disk Drive Prod. Antitrust Litig.*, 2016 WL 7364803, at *8 (N.D. Cal. Dec. 19, 2016)
16 (approving hourly rates of \$205 to \$950); *Gutierrez v. Wells Fargo Bank, N.A.*, Case No. 07-
17 05923 WHA, 2015 WL 2438274, at *5 (N.D. Cal. May 21, 2015) (approving hourly rates of \$475
18 to \$975).

19 These rates are the current rates charged by Plaintiffs’ Counsel, which is appropriate given
20 the deferred and contingent nature of counsel’s compensation. *See LeBlanc-Sternberg v. Fletcher*,
21 143 F.3d 748, 764 (2nd Cir. 1998) (“[C]urrent rates, rather than historical rates, should be applied
22 in order to compensate for the delay in payment...” (citing *Missouri v. Jenkins*, 491 U.S. 274,
23 283-84 (1989)); *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1305 (9th
24 Cir. 1994) (“The district court has discretion to compensate delay in payment in one of two ways:
25 (1) by applying the attorneys’ current rates to all hours billed during the course of litigation; or (2)
26 by using the attorneys’ historical rates and adding a prime rate enhancement.”).

27
28 ⁶ Some of Plaintiffs’ Counsel also previously worked for top defense firms; had they remained at
those firms their rates would be even higher than they are currently. Safier Decl. ¶ 49.

1 The requested fee equates to a 3.29 multiplier, and possibly lower depending on how
2 much work Plaintiffs' Counsel performs prior to (and after) Final Approval. This Court has dis-
3 cretion to apply a multiplier to increase the fee award to account for various factors, including,
4 *inter alia*, the contingent nature of the fee award (both from the point of view of eventual victory
5 on the merits and the point of view of establishing eligibility for an award), the novelty and com-
6 plexity of the questions involved, the value of class benefits obtained, the efficiency and skill dis-
7 played by class counsel, and the importance of other injunctive relief obtained. *See Serrano III*,
8 20 Cal. 3d at 49; *Ketchum v. Moses*, 24 Cal. 4th 1122, 1132 (2001); *City of Oakland v. Oakland*
9 *Raiders*, 203 Cal. App. 3d 78, 83 (1988); *Downey Cares v. Downey Community Dev. Comm'n*,
10 196 Cal. App. 3d 983, 995 n. 11 (1987); *see also Maria P. v. Riles*, 43 Cal. 3d 1281, 1294 n8
11 (1987); *Press v. Lucky Stores, Inc.*, 34 Cal. 3d 311, 322 (1983); *Serrano v. Unruh* ("Serrano IV"),
12 32 Cal.3d 621, 625 n6 (1982). Each of these factors justifies a multiplier here.

13 First, Plaintiffs' Counsel bore considerable risk in litigating this case wholly on a contin-
14 gent basis and advancing all costs. Safier Decl. ¶¶ 31-32; Sheehan Decl. ¶ 4; Wright Decl. ¶ 4.
15 During the pendency of the Actions, Plaintiffs' Counsel turned away other work. Safier Decl. ¶¶
16 31; Sheehan Decl. ¶ 4. Since Plaintiffs' Counsel's work is primarily focused on contingent-fee
17 class action cases, it does not get paid in every case. Frequently, it gets nothing or is awarded fees
18 equal to only a small percentage of the amount it had worked. Where a plaintiff's firm does suc-
19 ceed, therefore, it is appropriate to award a multiplier, to compensate for the risks the firm regu-
20 larly undertakes. As the California Supreme Court has explained:

21 [a] contingent fee must be higher than a fee for the same legal services paid as they
22 are performed. The contingent fee compensates the lawyer not only for the legal ser-
23 vices he renders but for the loan of those services. The implicit interest rate on such
24 a loan is higher because the risk of default (the loss of the case, which cancels the
25 debt of the client to the lawyer) is much higher than that of conventional loans. A
26 lawyer who both bears the risk of not being paid and provides legal services is not
27 receiving the fair market value of his work if he is paid only for the second of these
28 functions. If he is paid no more, competent counsel will be reluctant to accept fee
award cases.

26 *Ketchum*, 24 Cal. 4th at 1132-33; *see also Cazares v. Saenz*, 208 Cal. App. 3d 279, 288 (1989)
27 ("in theory, a contingent fee in a case with a 50 percent chance of success should be twice the
28

1 amount of a non-contingent fee for the same case.”). Indeed, in *In re Continental Illinois Securi-*
2 *ties Actions*, 962 F.2d 566 (7th Cir. 1993), a federal appellate court reversed a fee award in a class
3 action for, among other things, the trial court’s refusal to enhance class counsel’s lodestar for con-
4 tingency risk. It explained, “The judge refused to award a risk multiplier—that is, to give the law-
5 yers more than their ordinary billing rates in order to reflect the risky character of their
6 undertaking. This was error in a case in which the lawyers had no source of compensation for
7 their services.” *Id.* at 569. “[T]he failure to make any provision for risk of loss may result in sys-
8 tematic under-compensation of Class Counsel in a class action case, whereas we have said the
9 only fee that counsel can obtain is, in the nature of the case, a contingent one.” *Id.*

10 Second, Plaintiffs’ Counsel reached a settlement before class certification and thus should
11 be rewarded for its efficiency (and the concomitant savings to the judicial system). In *Lealao*, the
12 Court explained that, unless multipliers are provided when counsel agree to settle early, there will
13 be “a disincentive to settle promptly inherent in the lodestar methodology. Considering that our
14 Supreme Court has placed an extraordinarily high value on settlement, it would seem counsel
15 should be rewarded, not punished, for helping to achieve that goal, as in federal courts.” *Lealao*,
16 82 Cal. App. 4th at 52 (citing *Merola v. Atlantic Richfield Company*, 515 F.2d 165, 168 (3d Cir.
17 1975)) (lodestar-multiplier approach “permits the court to recognize and reward achievements of
18 a particularly resourceful attorney who secures a substantial benefit for his clients with a mini-
19 mum of time invested”); *Bowling v. Pfizer, Inc.*, 922 F. Supp. 1261, 1282-1283 (S.D. Ohio 1996)
20 (awarding a multiplier where case settled “in swift and efficient fashion”); *Arenson v. Board of*
21 *Trade of City of Chicago*, 372 F. Supp. 1349, 1358 (N.D. Ill. 1974) (awarding a fee of four times
22 the normal hourly rate on ground that, if the case had not settled and gone to verdict, “there is no
23 doubt that the number of hours of lawyer’s time expended would be more than quadruple the
24 number of hours expended to date”). Similarly, in *Thayer v. Wells Fargo Bank*, 92 Cal. App. 4th
25 819 (2001), the Court noted that “[t]he California cases appear to incorporate the ‘results ob-
26 tained’ factor into the ‘quality’ factor: i.e., high-quality work may produce greater results in less
27 time than would work of average quality, thus justifying a multiplier.”

1 Third, as explained above, Plaintiffs' Counsel achieved an excellent settlement in the Ac-
2 tions. Should the Court reduce Plaintiffs' Counsel's lodestar, the multiplier necessary to offset
3 that reduction would fall well within the range commonly applied by California courts. For exam-
4 ple, in *Wilson v. Airborne, Inc.*, 2008 WL 3854963 (C.D. Cal. Aug. 13, 2008), the court approved
5 a multiplier of 2.0 in a false advertising class action brought on behalf of consumers. *Id.* at *12.
6 Likewise, in *Sternwest Corp. v. Ash*, 183 Cal. App. 3d 74 (1986), the Court of Appeal remanded a
7 case for a lodestar enhancement of "two, three, four or otherwise." *Id.* at 76. Another California
8 court explicitly stated that "[m]ultipliers can range from two to four or even higher." *Wershba v.*
9 *Apple Comput., Inc.*, 91 Cal. App. 4th 224, 240 (2001) (citing *Coalition for L. A. County Plan-*
10 *ning etc. Interest v. Board of Supervisors*, 76 Cal. App. 3d 241, 251 (1977) (affirming a multiplier
11 of 2) and *Arenson*, 372 F. Supp. at 1358 (affirming a multiplier of 4); *see also City of Oakland*,
12 203 Cal. App. 3d at 83 (affirming a 2.34 multiplier); *Glendora Community Redevelopment*
13 *Agency v. Demeter*, 155 Cal. App. 3d 465, 479-80 (1984) (approving a multiplier of 12); *Vizcaino*
14 *v. Microsoft Corp.*, 290 F.3d 1043, 1051 n.6 (9th Cir. 2002) (granting a multiple of 3.65 and not-
15 ing that multipliers of one to four are frequently awarded).

16 Finally, Plaintiffs' Counsel will have to perform more work before the Settlement will be-
17 come effective, including, communicating with Class Members, supervising the Claim Adminis-
18 trator, responding to objections, and opposing any appeals. Plaintiffs' Counsel anticipates that
19 there will be another 50-75 hours before this Settlement is entirely complete and an estimated
20 175-250 hours if this Court's judgment is appealed. Safier Decl. ¶ 51. Should the Court award
21 less than the maximum amount of fees, Plaintiffs' Counsel reserves its right to seek additional at-
22 torneys' fees for later-performed work in connection with this Settlement, up to a total of no more
23 than \$2,500,000 for fees.

24 **C. Plaintiffs' Counsel Requests an Award of Its Actual Expenses.**

25 Plaintiffs' Counsel requests that, in addition to reasonable attorneys' fees, the Court grant
26 its application for reimbursement of approximately \$70,000 in out-of-pocket expenses incurred
27 by it in connection with the prosecution of the Actions. Safier Decl. ¶ 50, Ex. 3. Plaintiffs' Coun-
28 sel is typically entitled to reimbursement of all reasonable out-of-pocket expenses and costs in

1 prosecution of the claims and in obtaining a settlement. *See Vincent v. Hughes Air West*, 557 F.2d
2 759, 769 (9th Cir. 1977). As required by the District Guidelines ¶ 6, a current accounting of the
3 expenses incurred are itemized in counsel’s declaration. Safier Decl. ¶ 50, Ex. 3.

4 **IX. APPROVAL OF THE INCENTIVE AWARDS.**

5 This Court should also approve the requested Incentive Awards to the Plaintiffs as they
6 are just, fair and reasonable. In deciding whether to approve such an award, a court should con-
7 sider: “(1) the risk to the class representative in commencing suit, both financial and otherwise;
8 (2) the notoriety and personal difficulty encountered by the class representative; (3) the amount of
9 time and effort spent by the class representative; (4) the duration of the litigation and; (5) the per-
10 sonal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation.” *Van*
11 *Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995); *see also* District
12 Guidelines ¶ 7. Further, as a matter of public policy, representative service awards are necessary
13 to encourage consumers to formally challenge perceived false advertising and unfair business
14 practices.

15 Jennifer Marek, Isabelle Dwight, Jennifer Gannon, Darren Williams, Evvie Eyzaguirre, the
16 named plaintiffs in the Actions, took on substantial risk, most importantly the risk of publicity
17 and notoriety. Safier Decl. ¶ 52; Sheehan Decl. ¶ 14. They also searched their personal records for
18 responsive documents and communicated many times with counsel. *Id.* They also remained ac-
19 tively involved in the Actions prior to and after settlement. *Id.* The other named Plaintiffs all pro-
20 vided Class Counsel with sufficient information regarding their experiences and claims to enable
21 them to join this case and represent a nationwide class. *Id.* Finally, all the Plaintiffs agreed to a
22 broader general release than the release applicable to the other Settlement Class Members. *See*
23 Settlement ¶ 8.2.

24 The proposed Incentive Awards are reasonable in light of the Plaintiffs’ efforts in litigating
25 the Actions and the relief to the Settlement Class resulting from this Settlement. *See* Theodore Ei-
26 senberg & Geoffrey P. Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study,
27 53 UCLA L. Rev. 1303, 1333 (2006) (an empirical study of incentive awards to class action
28

1 plaintiffs has determined that the average aggregate incentive award within a consumer class ac-
2 tion case is \$29,055.20, and that the average individual award is \$6,358.80.); *see also In re Mego,*
3 *Fin. Corp.*, 213 F.3d at 463 (awarding the named plaintiff \$5,000 involving a class of 5,400 people
4 and a total recovery of \$1.725 million); *Smith v. CRST Van Expedited, Inc.*, 2013 WL 163293, *6
5 (S.D. Cal. Jan. 14, 2013) (finding the amount of the incentive payments requested, \$15,000, is
6 well within the range awarded in similar cases); *Embry v. Acer America Corp.*, Case No. 09-cv-
7 01808-JW, Dkt.# 218 (N.D. Cal. Feb. 14, 2012) (awarding \$15,000 incentive award); *Gibson &*
8 *Co. Ins. Brokers, Inc. v. Jackson Nat. Life Ins. Co.*, 2008 WL 618893 (C.D. Cal. Feb. 27, 2008)
9 (awarding \$5,000 incentive fee); *Mendoza v. Hyundai Motor Co.*, No. 15-cv-01685-BLF, 2017
10 WL 34059, at *15 (N.D. Cal. Jan 23, 2017) (“\$5,000 is presumptively reasonable.”) (citations
11 omitted).

12 X. THE COURT SHOULD SET A FINAL APPROVAL SCHEDULE

13 The last step in the settlement approval process is the Final Approval Hearing at which the
14 parties will seek final approval of the proposed Settlement. At the Final Approval Hearing, propo-
15 nents of the Settlement may explain and describe its terms and conditions and offer argument in
16 support of final approval of the Settlement. Also, Settlement Class Members, or their counsel,
17 may be heard in support of or in opposition to final approval of the Settlement. Plaintiffs request
18 the Court issue a schedule establishing the Notice Date, submitting timely Claim Forms, exclu-
19 sions and objections, and for the Final Approval Hearing.

20 Plaintiffs propose the following schedule:

21 <u>Item</u>	<u>Proposed Due Date</u>
22 Notice Date	March 10, 2023
23 Deadline for objections, claims, opt-outs	April 21, 2023
24 Deadline for Settlement Administrator to file a 25 declaration pursuant to Agreement 5.8 and 5.9	May 5, 2023
26 Replies in support of final approval and for attor- 27 neys’ fees, costs and representative awards; re- 28 sponse to objections	May 5, 2023
Final Approval hearing	May 24, 2023 at 2 p.m.

XI. CONCLUSION

For the foregoing reasons, Plaintiffs and Plaintiffs' Counsel respectfully request that the Court: (1) grant preliminary approval of the Settlement; (2) conditionally certify the Settlement Class for settlement purposes only, designate the Plaintiffs as Class Representatives, and appoint Gutride Safier LLP, Sheehan and Associates, P.C., and Wright Law Office, P.A. as Class Counsel; (3) appoint Angeion Group as the Settlement Administrator and approve payment of \$390,000 to Angeion Group for the estimated costs of the Notice Plan; (4) approve the Notice Plan and the forms of the Long Form Notice, Online Notice, and Published Notice to Class Members; (5) mandate procedures and deadlines for exclusion requests and objections; and (6) set a date, time and place for the Final Approval Hearing.

Dated: January 13, 2023

GUTRIDE SAFIER LLP

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